In The

Supreme Court of the United States

October Term, 1976

No. 75-1722

PAUL FOLLIARD,

Petitioner,

v.

PSYCHIATRIC INSTITUTE OF WASHINGTON, D. C., INC., PSYCHIATRIC INSTITUTES OF AMERICA, PROFESSIONAL ASSOCIATES OF THE PSYCHIATRIC INSTITUTE OF WASHINGTON, D. C.,

Respondents,

v.

HELEN SEMLER, ADMINISTRATRIX OF THE ESTATE OF NATALIA SEMLER, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANDREW P. MILLER
Attorney General of Virginia

STUART H. DUNN
Deputy Attorney General

HENRY M. MASSIE, JR.
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

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Ex. App. ...., DF-.... refers to Exhibits reproduced in separate appendix of exhibits with reference to the page of that volume and the number of that exhibit in the lower court. This volume is also a part of the record from the court below.

Pet. App. .... refers to the appendix attached to this petition containing the opinion and findings below.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Paul Folliard, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 27, 1976.

I.

OPINIONS BELOW

The Opinion of the Court of Appeals of February 27, 1976, not yet reported appears in the Appendix hereto. The Findings of Fact and Conclusions of Law of the District Court for the Eastern District of Virginia of October 17, 1974, also appears in the Appendix and has not been reported.

II.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 27, 1976, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The specific ground on which jurisdiction of this Court is invoked is that the United States Court of Appeals for the Fourth Circuit has decided an important state question in a way in conflict with applicable state law as stated in Rule 19(b) of the Rules of the Supreme Court of the United States.

III.

QUESTIONS PRESENTED FOR REVIEW

Whether the difference in treatment between that recommended for the probationer by his attending physician at the Augustana Mental Health Center and that being provided by the same physician at the Psychiatric Institute of Washington, D. C., was such as to place a probation officer on notice of the existence of a ministerial duty to obtain court approval for such treatment for his probationer under the terms of a sentencing order providing for

probation and mental treatment when such treatment was the proper treatment in the opinion of the attending physician.

IV.

STATEMENT OF THE CASE

Plaintiff, a Virginia citizen, filed this action on Feburary 25, 1974, in the Federal District Court for the Eastern District of Virginia, Alexandria Division, for the wrongful death of her daughter, allegedly murdered by John Gilreath, a convicted felon receiving mental treatment. The plaintiff's claim is that Gilreath was negligently supervised by the defendants, a mental hospital and a psychiatrist residing in the District of Columbia. Jurisdiction is founded on diversity of citizenship. The defendants filed a Third-Party Complaint on May 21, 1974, against Paul Folliard, Gilreath's probation officer, alleging that if they (defendants) were liable, Folliard was also liable and must indemnify them or make contribution. On October 17, 1974, following a trial on the merits, Judge Albert V. Bryan, Jr., found the defendants liable for $25,000, one-half of which was to be recovered from the third-party defendant upon payment of the $25,000 to the plaintiff by the defendants. An Order to this effect was entered on October 18, 1974. On October 24, 1974, the third-party defendant filed a Notice of Appeal in the District Court. A Notice of Appeal was also subsequently filed by the defendants. The case was argued on November 10, 1975, before the United States Court of Appeals for the Fourth Circuit. That Court affirmed the decision of the District Court by Opinion of February 27, 1976. Petitioner's Application for a Stay of the Execution and Enforcement of the Judgment pending application to this Court for a Writ of Certiorari was denied by that

Court on March 15, 1976, and a subsequent application was denied by Mr. Chief Justice Burger on April 5, 1976. The matter now comes before this Court on this petition for a Writ of Certiorari by the third-party defendant, Paul Folliard.

V.

STATEMENT OF FACTS

This statement of facts will generally outline the case. Other specific facts will be presented in properly referenced form in the Argument for convenience of presentation. There is also a Stipulation of Facts beginning at App. 38.

John Stephen Gilreath, a twenty-two year old white male, was sentenced on August 18, 1972, to twenty years in the State Penitentiary on the charge of abduction by William G. Plummer, Judge of the Fairfax County Circuit Court. The sentence was suspended and Gilreath was put on probation for a period of twenty years on the special condition that he receive psychiatric treatment as more fully set out at pages 9-10 hereof. (Ex. App. 33, 34, DF-10). Paul Folliard was the probation officer assigned the case. He had prepared the pre-sentence report. (Ex. App. 23-32, DF-9).

The crime for which Gilreath was sentenced occurred on October 5, 1971. He was given psychiatric examinations and found competent to stand trial. (Ex. App. 15, 16, 18, DF-4, 6). On March 2, 1972, he was released on bond from the Fairfax County jail and entered the Psychiatric Institute of Washington, D. C., where he was placed under the care of Dr. Ralph W. Wadeson, Jr., a staff psychiatrist. (App. 69) (Ex. App. 21, 22, 30, DF-8, 9). Dr. Wadeson met with Judge Plummer and explained the methods employed at the Psychiatric Institute and the recommended treatment for

Gilreath if final sentence were to provide for such treatment as recommended in the pre-sentence report. (App. 73, 120-125, 134, 155, 159). Gilreath continued at the Institute under Dr. Wadeson's care after his formal sentence on August 18, 1972, in accordance with the order of the court.

The hospital, having treated Gilreath since March, requested permission from the court for Gilreath to spend Thanksgiving and Christmas days at home. (App. 125, 126) (Ex. App. 41, 42, DF-14, 15). The Christmas pass was subsequently changed to an overnight pass at Dr. Wadeson's request. (Ex. App. 43, DF-16). A New Year's Day pass was obtained on the same basis. (Ex. App. 44, DF-17). On January 18, 1973, Dr. Wadeson sent a progress report to Mr. Folliard in which he recommended that Gilreath be granted "greater freedom":

> "At this time because he lives in a very sheltered and highly structured situation, however, and this means that he does not leave the hospital except to go to a nearby building for rehabilitation activities and on those occasions he is accompanied by a staff member, I feel it is now time to extend his day-to-day living to include more contact with the outside world through trial visits to his home as well as being more responsible for himself and attending all rehabilitation activities that are part of the psychotherapeutic program of the Psychiatric Institute without having to be staff accompanied." (Ex. App. 46, DF-18).

After receiving this letter from Mr. Folliard, Judge Pummer inquired of Dr. Wadeson what was meant by "greater freedom." (Ex. App. 47, DF-19). Dr. Wadeson responded directly to the Judge by letter of February 23, 1973:

> ". . . my present recommendation is that John be allowed greater privileges outside the hospital in order that he may relate with other people and other situations that will broaden his capacity to be a more well rounded member of society. . . . In my best clinical judgment at this time, John is not a danger to himself or to others and it is within this context that I make the above request." (Ex. App. 48, 49, DF-20).

The only reaction by Judge Plummer was to tell Folliard to approve passes for Gilreath himself and no longer to come to the court with requests for pass approval. (App. 352-354). There was no other indication from the court approving or disapproving this "greater freedom" Gilreath was subsequently accorded.

As the ". . . logical next step in the evolution of this young man's ability to function in society," Dr. Wadeson recommended by letter of May 29, 1973, that Gilreath move away from the hospital and attend daily treatment sessions during the week:

> "The patient has been going on home passes since November 1972, for weekends with his parents. These weekends have enhanced family communication and relationships among the members. There has been no evidence of anti-social or inappropriate or bizarre behavior on those weekend passes. Since April 1, 1973, the patient has been given special passes at the discretion the team staff and the team and these have gone very well. There has been no evidence of any breakthrough of his aggressive or sexual impulses on these special passes." (Ex. App. 51, DF-21).

Judge Plummer approved this end to hospital residence without investigation on June 6, 1973. (App. 313, 356).

Prior to leaving the hospital, Gilreath had spoken to members of his therapy team and the staff about moving to Ohio

to live and to work for his aunt and uncle. (App. 82, 138, 139). Although skeptical of this plan when first suggested to him by Gilreath, Mr. Folliard pursued it further when Dr. Wadeson informed him that it was reasonable. (Ex. App. 3, DF-1) (App. 139). Accordingly, Mr. Folliard authorized a four day pass from July 19 through July 23, 1973, for Gilreath to visit his aunt and uncle in Ohio to develop the plan for transfer. (Ex. App. 53, DF-23) (App. 306, 307). Upon his return, he presented a detailed plan to Mr. Folliard. (App. 140, 307, 319, 320). Mr. Folliard presented the plan in a letter dated August 1, 1973, to Mr. Charles P. Chew, Official Administrator of the Interstate Compact to implement the mechanics of the transfer (Ex. App. 56, 57, DF-25).

Judge Plummer was on vacation during the month of August. (App. 311). Mr. Folliard was to begin his vacation on September 2. (App. 315). Gilreath had to be in Ohio to begin his job as caretaker of an apartment house for students before school began in September. (App. 310, 322). Having heard nothing from the Ohio authorities Mr. Folliard authorized on August 29, 1973, a fourteen day pass beginning September 2 for Gilreath to go to Ohio to begin work. (Ex. App. 60, DF-27). Gilreath was instructed to contact the local Probation Officer when he arrived in Cincinnati. (App. 309) (Ex. App. 60, DF-27). Once Gilreath was accepted by Ohio, the complete transfer package was to be presented to Judge Plummer for final approval. (App. 325, 326). It was understood that if Gilreath were not accepted in Ohio, he would continue in Dr. Wadeson's care. (App. 114, 146, 147, 359, 360). On September 4, 1973, Gilreath's application for transfer was rejected by Ohio. (Ex. App. 62, DF-29). Upon his return, he was immediately placed in treatment by Dr. Wadeson at the

Augustana Mental Health Center. (App. 109, 110, 135, 147, 329).

Augustana Medical Health Center was a location away from the Psychiatric Institute at which Dr. Wadeson and his staff provided group therapy treatment for patients under Dr. Wadeson's care. This was the treatment Dr. Wadeson recommended for Gilreath at this time based on his prior eighteen months of observation. (App. 143). Gilreath continued to reside outside the hospital, held a job, and attended group therapy sessions twice a week. (App. 135, 136). He attended all but one of the sessions through the date of the death of the plaintiff's daughter, October 29, 1973. (App. 41). He was in attendance at the session on October 29, 1973. (App. 41).

VI.

ARGUMENT

Folliard has had the issues of negligence and proximate cause decided against him in the District Court and the Fourth Circuit. Although he feels these issues were wrongly decided and should be reviewed, he understands it to be highly unlikely that this Court would grant certiorari on these questions of mixed law and fact as a result of the "two court rule." For this reason and to focus on the important State question decided in a way in conflict with applicable State law as stated in Rule 19(b) of the Rules of the Supreme Court of the United States, these matters will not be pressed before this Court, but rather the only issue that will be submitted is the existence of the duty that was said to have been placed upon Mr. Folliard and the classification of the same as "ministerial" under Virginia law. Virginia law was clearly misapplied on this issue with

the result that Mr. Folliard and others similarly situated are placed in such a straitjacket position that they lack the flexibility to perform their duties confidently and competently in this area where probation is coupled with psychiatric treatment and an individual's civil rights so vitally affected. The question is important and the answer has far-reaching implications to the Virginia penal system.

1. Relevant Chronology

a. The Court Order

The only court order ever entered in this case was entered on August 18, 1972, and reads in pertinent part:

> ". . . [I]t is Adjudged and Ordered that John Stephen Gilreath do serve twenty (20) years in the Penitentiary House of this Commonwealth, at hard labor; but in mitigation of punishment, it appearing compatible with the public interest so to do, the Court does now suspend the serving of the said sentence, conditioned upon the Defendant's good behavior and he shall be on active probation subject to the conditions set forth in P.B. Form 2—Revised 5-71 for a period of twenty (20) years and further conditioned that the continued (sic) to receive treatment at and remain confined in the Psychiatric Institute until released by the Court." (Ex. App. 33, 34, DF-10).

Suspension of sentence, probation and psychiatric treatment are generally understood in Virginia to be for the purpose of providing the probationer an opportunity to repent and reform and to become rehabilitated. *Richardson* v. *Comm.*, 131 Va. 802, 809, 810, 109 S.E. 460, 462 (1921); *Wilborn* v. *Saunders*, 170 Va. 153, 160, 161, 195 S.E. 723, 726 (1938); *Loving* v. *Comm.*, 206 Va. 924, 930, 147 S.E.2d 78, 83 (1966), reversed on other grounds 388 U.S. 1, 87

S.Ct. 1817 (1967). The specific requirement of "confinement" which was coupled with probation in the aforesaid order was implemented under close court supervision until it ceased with full approval of the court. The more general and more vague requirement of "treatment" was continuing at the time of the occurrence.

P.B. Form 2—Revised 5-71 referred to in the order informed Gilreath among other things:

> "(f) Do not leave or remain away from the community where you reside without Permission of your Probation Officer. You shall not change your residence without the permission of your Probation Officer."
>
> * * *
>
> "(k) Follow the Probation Officer's instructions and advice. The law gives him authority to instruct and advise you regarding your activities." (Ex. App. 35, DF-11).

They are a portion of the normal printed instructions on the normal printed form for this purpose.

The generalities of "treatment" offered by the hospital had been fully explained to Judge Plummer prior to sentencing. No instructions were given to Folliard by Judge Plummer in this regard. (App. 350, 351, 358).

b. Treatment and Confinement

Gilreath was kept closely confined to his unit (App. 122, 123) according to the terms of the order until November of 1972, at which time the Psychiatric Institute felt that he had progressed in his treatment to the point at which it would be beneficial to observe his activities away from the hospital on passes.

(1) *Greater Freedom*

A succession of overnight passes having been granted by the court and having proved successful, the Psychiatric Institute felt that Gilreath's treatment had advanced to the stage by January of 1973, at which he should be given "greater freedom."[1] This "greater freedom" consisted of full use of the hospital facilities on his own, afternoon passes away from the hospital by himself and with other patients and regular weekend passes. (App. 128-131). The requests for passes came so frequently that Judge Plummer told Mr. Folliard to handle the matter of pass approval. (App. 352-354). Folliard approved approximately two weekend passes per month for Gilreath. (App. 40).

3. Treatment as a Nonresident

The treatment of Gilreath progressed satisfactorily to the point where he was away from the hospital regularly with no significant incidents in the spring of 1973. It was consequently the judgment of the Psychiatric Institute that the desirable status for him at this time was to reside at home and attend the hospital during the day. (App. 131).

(1) *May 29, 1973, Letter*[2]

In preparation for this move from the hospital, Dr. Wadeson submitted a report to Paul Folliard outlining the progress Gilreath had made and recommending this treatment to the court as the ". . . logical next step in the evolu-

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[1] *See* Ex. App. 45-49, DF-18, 19, 20. Although Judge Plummer inquired as to more detail regarding what was meant by "greater freedom," there is no evidence that he ever required or granted any kind of formal permission for this progression in treatment.

[2] *See* Ex. App. 50, 51, DF-21.

tion of the young man's improved ability to function in society." Mr. Folliard took this letter to Judge Plummer on June 6, 1973. Judge Plummer approved the recommendation with no hearing, no investigation and no further communication with the Psychiatric Institute or Dr. Wadeson. Confinement ceased.

The letter from Dr. Wadeson did not accept responsibility for limiting the actions of Gilreath, but described his progression and recommending treatment in a general manner. The treatment was to be as a nonresident of the hospital and was fully consistent with the "open door" plan of treatment employed by the Psychiatric Institute of which Judge Plummer had been previously informed. (App. 124). *See Eanes* v. *United States,* 280 F.Supp. 143 (E.D. Va. 1968), *aff'd. per curiam,* 407 F.2d 823 (4th Cir. 1969). This method recognizes that it is reasonable psychiatric therapy to extend ever greater privileges in an effort to better the patient's condition. It requires society to share certain risks in the rehabilitation of mental patients. *White* v. *United States,* 244 F.Supp. 127 (E.D. Va. 1965), *aff'd. per curiam,* 359 F.2d 989 (4th Cir. 1966).

As a result of the recommendation contained in this letter, Gilreath was put on a flexible program in which he was on his own and attending therapy sessions on week days. He was also free on week day afternoons as the sessions at the Psychiatric Institute often did not take the full day. (App. 333). He would occasionally visit Folliard and discuss matters relating to his probation. (App. 304).

(2) *Ohio Trips*

While still confined in the hospital, Gilreath had discussed with his therapy group and Dr. Wadeson his desire to go to Ohio to live with his aunt and uncle to begin a new life.

He was told that this sounded like an acceptable idea and to take it up with his probation officer. He discussed this matter with Folliard on his occasional visits after having moved out of the hospital. Folliard was at first ". . . somewhat skeptical of this plan but in a talk with Dr. Wadeson, he [Wadeson] had given his approval so . . . [Folliard] pursued the matter further with . . . [Gilreath]."[3]

To explore the possibilities further a four-day pass was approved by Folliard[4] in July for Gilreath to prepare plans for possible transfer to Ohio. Upon his return, he outlined these plans for lodging, work and medical treatment. Folliard put the official machinery in progress to investigate and accomplish transfer by a letter dated August 1, 1973, to Mr. Charles P. Chew, Official Administer of Interstate Compact in which he described Gilreath's treatment as follows:

> "He was recently put on an out-patient program, and at this time the doctors feel he is ready for more freedom and, therefore, to see what he can do on his own." (Ex. App. 56, DF-25).

Judge Plummer was on vacation for the month of August and Folliard was going on vacation on September 2, 1973. Gilreath would lose his job if he were not in Ohio to begin work before school began. Therefore, having heard nothing from the Ohio authorities by the latter part of August and the hospital having recommended the transfer, Folliard authorized a fourteen-day pass which was the limit of his

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[3] *See* App. 3, DF-1 (last paragraph).

[4] There can be no doubt that Folliard had authority to approve such a trip as the District Court concedes he had authority to authorize passes and furthermore P.B. Form 2—Revised 5-71, provides for it. (Ex. App. 35, DF-11) (App. 339).

pass authority. (App. 329, 331). The pass was to extend to September 16 by which time he expected to have obtained approval from the Ohio authorities and Judge Plummer.

(3) *August 29, 1973, Letter*[5]

Folliard began his vacation on September 2, 1973. On September 4, 1973,[6] a letter was received in his office from Dr. Wadeson indicating that Gilreath had been discharged from Psychiatric Institute to go to Ohio on August 22, 1973. Although he had approved the Ohio trip beginning September 2, Folliard had no prior knowledge that Gilreath would be discharged on August 22. (App. 315). It was understood by Dr. Wadeson and Mr. Folliard that the trip to Ohio was *not* to involve a final discharge unless Gilreath were accepted there and the transfer could be completed. If he were not accepted, he was to return to the care of Dr. Wadeson, which in fact subsequently occurred. (App. 114, 146, 147, 359, 360).

(4) *Augustana Mental Health Center*

Upon Gilreath's return from Ohio, it was Dr. Wadeson's medical judgment that Gilreath should obtain a job and receive necessary treatment at group therapy sessions. He included Gilreath in a group which met at Augustana Mental Health Center two nights a week.

No approval was requested by Psychiatric Institute from Judge Plummer or Folliard for this treatment. Folliard reasonably viewed this as continuance of the care by Dr. Wadeson and the normal progression of the outpatient treatment which had been continuing successfully since

[5] *See* Ex. App. 61, DF-28.

[6] *Id.* (lower right-hand corner).

Gilreath's release from confinement in the hospital in June of 1973.[7] (App. 132, 133, 137, 138, 308, 323, 324, 370). He had only sought Judge Plummer's approval in the past when requested by the Psychiatric Institute which had the responsibility for treating Gilreath and judging when there was sufficient medical question to call in the judge. (App. 134, 135). No flag was raised to him that this was other than normal outpatient treatment. Gilreath appeared to be progressing satisfactorily under Dr. Wadeson's care at Augustana Mental Health Center for approximately six weeks before the death of plaintiff's daughter occurred.

2. The Duty

An employee of the Commonwealth of Virginia who exercises discretionary judgment within the scope of his employment is not liable for simple negligence. *Lawhorne* v. *Harlan,* 214 Va. 405, 200 S.E.2d 569 (1973). In the *Lawhorne* case, the Virginia Supreme Court held that an intern employed by the State who saw, treated and released a patient saying "there was nothing seriously wrong" was immune from liability in that he did not have a ministerial duty to summon the patient to return to the hospital for further treatment when the intern later determined from X-ray that the patient had in fact suffered a fractured skull. The patient died of this injury and the facts indicate the intern's negligence. As the Fourth Circuit acknowledged, "No Virginia case has applied these principles to the duties of a probation officer. . . ." (Pet. App. 15). The only guid-

[7] Note that in Ex. App. 56, DF-25 written on August 1, 1973, while Gilreath was attending the Psychiatric Institute on weekdays that Folliard informed Mr. Chew that Gilreath was recently put on an "out-patient" program. It is clear that Folliard considered Gilreath an outpatient from the time he moved out of the hospital in June. Dr. Wadeson admits the term can be confusing. (App. 132, 133).

ance offered by it as to its interpretation of Virginia law was the following definition of a ministerial act:

> ". . . [O]ne which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done." *Dovel* v. *Bertram,* 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945). (Pet. App. 15).

It apparently found no relevance to the case of *Bellamy* v. *Gates and Gill,* 214 Va. 314, 200 S.E.2d 533 (1973) in which a police chief was said by the Virginia Supreme Court not to be performing a ministerial duty when acting as a relayer of information pursuant to a judicial order. Cases from other jurisdictions provide little assistance in interpreting the Virginia probation statutes. *White* v. *Comm.,* 170 Va. 641, 196 S.E. 610 (1938).

The sentencing order upon which Folliard was operating has been previously set out. As to such orders the Virginia Supreme Court has warned:

> ". . . [T]hat a sentence must be . . . not ambiguous, and not open to any serious misapprehensions by those who execute it." *Hudson* v. *Youell,* 178 Va. 525, 533, 17 S.E.2d 403, 406 (1941).

yet this Court understands the reality that the conditions are often "vague." *Morrissey* v. *Brewer,* 408 U.S. 471, 479, 92 S.Ct. 2593, 2599 (1972). That Folliard was not specifically informed of a ministerial duty being placed upon him in regard to stages of "treatment" is not disputed.[8] The judge was informed of the release from confinement, but an understanding of the term "confinement" requires no medical knowledge. Without some specific guidance, however, the

[8] The approval of passes certainly is not ministerial.

fact that the judge was not informed of the Augustana treatment, which is implied to have posed some indirect threat to society, was more clearly in a discretionary area for Folliard, who is not a doctor, than the failure of the intern to inform the patient in *Lawhorne.* The intern had the duty and training to make the necessary medical judgment. A like-minded court in *Lawhorne* would easily have found an affirmative ministerial duty on the intern to inform a previously misinformed patient of the correct diagnosis where that patient's life was threatened directly. Virginia law does not so easily find a ministerial duty.

This misclassification of the duty as ministerial presents a serious threat to those persons in Virginia charged with custodial responsibility in the area of rehabilitation of convicted felons. To fully appreciate the problem, one must first realize that a state must be cognizant of the constitutional rights of convicted felons on parole, *Morrissey* v. *Brewer, supra,* and that the stated goal of parole or probation[9] is:

> ". . . [T]o help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed." *Id.* at 408 U.S. 477, 92 S.Ct 2598.

The hard fact must be accepted, however, that inherent in this process

> ". . . [I]s a risk that they will not be able to live in society without committing additional anti-social acts." *Id.* at 408 U.S. 483, 92 S.Ct. 2601.

[9] Parole is used after a sentence has been imposed while probation is usually granted in lieu of a prison term. *Morrissey* v. *Brewer, supra,* at 408 U.S. 496, 92 S.Ct. 2608 (Dissenting opinion of Justice Douglas) (ftn. 6).

As Justice Douglas points out in his dissent in *Morrissey*, this area of probation and parole is known to have become largely an administrative one which may involve referral for psychiatric treatment, and, as the majority emphasizes:

> ". . . [B]road discretion [is] accorded the parole officer . . . in some of the quite vague conditions. . . ." *Id.* at 408 U.S. 479, 92 S.Ct. 2599.

To round out the problem, this Court has instructed in *O'Connor* v. *Donaldson*, 422 U.S. 563, 576, 95 S.Ct. 2486, 2494 (1975) that:

> ". . . [A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."

and that a State official with custodial responsibility can be held personally liable for damages under 42 U.S.C. § 1983 if he

> ". . . [K]new or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of . . . [the individual]. . . ." *Id.* at 422 U.S. 577, 95 S.Ct. 2494.

The medical opinion at the time of the Augustana treatment was that Gilreath was ". . . not a danger to himself or to others . . ." and that the treatment at Augustana Mental Health Center was the proper treatment for Gilreath. It was not a release from "treatment" but a continuation thereof. Certainly there was no basis upon which one could reasonably justify decreasing the freedoms already awarded Gilreath, and, recognizing the broad discretion vested in a probation officer, it was within his discretion to allow proper

medical treatment. In fact his only apparent risk would have been in taking a position contrary to such advice according to the implications of *O'Connor*. Only if he had professional doubts should he be expected to involve the judge and that would have been an exercise of his judgment.

The trend of the law in the area of the liability of a State employee under § 1983 would seem to advise a probation officer that he is on firm ground in following qualified medical advice which provides the state charge with maximum personal liberty in his treatment. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683 (1974); *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992 (1975); *O'Connor* v. *Donaldson, supra*. This Court must recognize that the teaching of these cases is to this effect. Absolute good faith is no longer a complete defense and the right to liberty is one of the most basic constitutional rights protected by this Court. The probation officer must exercise his judgment in this regard. The risk to society, on the other hand, is inherent in acceptance of the mode of treatment. To allow liability for an act, done in undisputed good faith, which accords with the spirit of federal law in an area where the limits on the duties are vague at best, is error on its face. Such an area demands the exercise of great discretion. Any other result would cause the actions of a probation officer to be constantly exposed to liability and make him afraid to take any action on his own with the result that the teachings of this Court under the Civil Rights Act would become mechanistic in this area in Virginia. The very nature of the job cries out for flexibility in the implementation, and flexibility demands discretion.

It was clear error of State law to hold that Mr. Folliard was limited to a pure ministerial duty in this case. Otherwise every court will end up reviewing every medical decision

and the consequent lag in time and battle of the experts will be in derogation of the modern goals of rehabilitation and expansion of civil rights. It was within the discretion of Folliard to acquiesce in the treatment at the Augustana Mental Health Center. No ministerial duty was placed upon him to run to the court for permission to provide Gilreath proper medical treatment. Folliard could reasonably have concluded that the law entitled Gilreath to it. *See Donaldson* v. *O'Connor,* 493 F.2d 507 (5th Cir. 1974), vacated and remanded on other grounds, *O'Connor* v. *Donaldson, supra.* Depending on how one chooses to read the last two lines of the order, Folliard had at most a ministerial duty to obtain court approval for a *cessation* of "treatment." The Virginia courts would not have found a ministerial duty, and, in any case, would grant Folliard immunity for a mistake in judgment even assuming the more cautious decision would have been to have the suggested treatment reviewed by the judge. The use of diversity jurisdiction has clamped the Virginia system in an inflexible vice. Virginia law does not authorize this result and *Erie R. Co.* v. *Thompkins,* 304 U.S. 64, 58 S.Ct. 817 (1938) is a cornerstone of American jurisprudence.

VII.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

PAUL FOLLIARD

By: .....
Counsel

ANDREW P. MILLER
Attorney General of Virginia

HENRY M. MASSIE, JR.
STUART H. DUNN
Assistant Attorneys General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I certify that on this 25th day of May, 1976, I mailed, postage prepaid, three true and correct copies of this Petition for a Writ of Certiorari to Robert W. Lewis, Esquire, 4027 Chain Bridge Road, Fairfax, Virginia 22030, counsel for Respondent, Helen Semler, and Darryl L. Wyland, Esquire, 8111 Gatehouse Road, Suite 409, Falls Church, Virginia 22042, counsel for Respondents, Psychiatric Institute of Washington, D. C., Inc., *et al.,* in accordance with Rule 33, 1. of the Rules of the Supreme Court of the United States.

HENRY M. MASSIE, JR.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-2345

Helen Semler, Administratrix of the Estate
of Natalia Semler, deceased,

Appellee,

v.

Psychiatric Institute of Washington, D. C.; Psychiatric Institutes of America; Professional Associates of the Psychiatric Institute of Washington, D. C.; Ralph W. Wadeson, Jr., M.D., Individually,

Defendants,

v.

Paul Folliard,

Appellant.

No. 74-2346

Helen Semler, Administratrix of the Estate
of Natalia Semler, deceased,

Appellee,

v.

Psychiatric Institute of Washington, D. C., Inc.; Psychiatric Institutes of America; Professional Associates of the Psychiatric Institute of Washington, D. C., Inc.; Ralph W. Wadeson, Jr., M.D.,

Appellants,

v.

Paul Folliard,

Third-Party Defendant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., District Judge.

Argued November 10, 1975 Decided February 27, 1976

Before CRAVEN, BUTZNER, and RUSSELL, Circuit Judges.

Henry M. Massie, Jr., Assistant Attorney General of Virginia, (Andrew P. Miller, Attorney General of Virginia, and Stuart H. Dunn, Assistant Attorney General of Virginia, on brief) for Paul Folliard; Darryl L. Wyland (Anderson, Wyland, Yost & McMurtie, on brief) for Psychiatric Institute of Washington, D. C., Inc., Psychiatric Institute of America, Professional Associates, and Ralph W. Wadeson, Jr., M.D.; Robert W. Lewis (Lewis, Wilson, Cowles, Lewis & Jones, on brief) for Helen Semler.

BUTZNER, Circuit Judge:

These appeals arise from a negligence action brought by Helen Semler against Psychiatric Institute of Washington, D. C., Psychiatric Institute of America, Professional Associates of the Psychiatric Institute of Washington, D. C., and Ralph W. Wadeson, Jr., M.D.[1] Jurisdiction rests on diversity of citizenship. Mrs. Semler seeks recovery for the death of her daughter Natalia, who was killed by John Steven Gilreath, a Virginia probationer who had been a patient at the Institute. The original defendants filed a third party complaint against Paul Folliard, Gilreath's probation officer, seeking indemnification or contribution from him if they should be found liable. We will generally

[1] These defendants stipulated that if Dr. Wadeson, the treating physician, were liable, they were jointly liable.

refer to the original defendants and the third party defendant collectively as the appellants. The district court, sitting without a jury, awarded the plaintiff $25,000 against the psychiatrists and required Folliard to contribute one-half of this judgment. We affirm.

I

Gilreath had been indicted in Fairfax County, Virginia, for abducting a young girl in October 1971. Pending his trial, he entered the Institute for psychiatric treatment. His doctor, Ralph W. Wadeson, Jr., M.D., wrote Gilreath's attorney that he thought Gilreath could benefit from continued treatment and that he did not "consider him to be a danger to himself or others as long as he is in a supervised, structured way of life such as furnished here at Psychiatric Institute." In August 1972, after conferring with Doctor Wadeson, Judge William Plummer of the state court sentenced Gilreath on his guilty plea to 20 years' imprisonment but suspended the sentence, conditioned on his continued treatment and confinement at the Institute.

A few months later, upon the doctor's recommendation and the probation officer's request, the state judge allowed Gilreath to visit his family for Thanksgiving and Christmas. Subsequently, again on the recommendation of the doctor, the judge allowed additional passes, and early in 1973 he authorized the probation officer to grant weekend passes at his discretion.

In May 1973, the doctor recommended that Gilreath

> ". . . be transferred to the status of a Day Care patient whereby he would be coming into the hospital at 8 o'clock each morning and leaving the hospital at 5 o'clock each evening. He would commute to and from

> the hospital with his parents and would spend weekends at home with his parents. He would be under parental supervision for nights and weekends and he would be under psychiatric supervision during the day while on the unit. This seems like a logical next step in the evolution of this young man's improved ability to function in society."

The probation officer transmitted this recommendation to the state judge, who approved it.

In the meantime, Gilreath became increasingly concerned about the financial burden on his parents for the cost of his treatment at the Institute. He also thought he would benefit if he could begin life anew with relatives in Ohio. In July 1973 the probation officer gave Gilreath a three-day pass to go to Ohio and investigate the possibility of moving there. Gilreath made tentative arrangements to work for his uncle and attend therapy sessions at a nearby hospital. The officer later gave Gilreath a fourteen-day pass so that he could return to Ohio in September to prepare for a transfer of probation to that state. The officer approved each of these trips after discussing them with the doctor, who felt that such a change would help Gilreath. Neither pass was submitted to the state judge for approval. On August 29, the doctor, assuming Gilreath would be accepted for probation in Ohio, wrote the probation officer that Gilreath had been discharged from the Institute.

The Ohio probation authorities, however, rejected Gilreath's application for transfer. He telephoned this news to his probation officer, who instructed him to return to Virginia. On September 19, Gilreath visited his doctor, who told him he should have additional therapy. The doctor did not restore Gilreath to day care status but instead enrolled

him in a therapy group that met two nights a week. As an out-patient, Gilreath lived first at home and later alone, working as a bricklayer's helper. He told the probation officer about this arrangement, but the officer did not report it to the judge. In late September the officer was promoted, and a new probation officer was assigned Gilreath about October 1. Gilreath killed the plaintiff's daughter on October 29, 1973.

II

Apparently, no Virginia case deals with a claim similar to Mrs. Semler's, so we must resort to the general principles of the Virginia law of torts. These have been succinctly stated in Trimyer v. Norfolk Tallow Co., 192 Va. 776, 780, 66 S.E.2d 441, 443 (1951), as follows:

> "To constitute actionable negligence there must be a duty, a violation thereof, and a consequent injury. An accident which is not reasonably to be foreseen by the exercise of reasonable care and prudence is not sufficient ground for a negligence action."

We will consider each of these elements separately. The first is whether the appellants owed the public, including the decedent, Natalia Semler, any duty. This is a question of law. Chesapeake Potomac Telephone Co. v. Bullock, 182 Va. 440, 29 S.E.2d 228, 230 (1944).

The judgment convicting Gilreath for abduction suspended his 20-year sentence on the general conditions of probation and the following special condition: "[T]hat he continue to receive treatment at and remain confined in the Psychiatric Institute until released by the Court." Both the doctor and the probation officer argue that this order created no duty on their part to Natalia Semler. They main-

tain that the purpose of the order was to rehabilitate Gilreath and that their duty extended only to him. Quite properly, we believe, the district judge rejected the appellants' limited interpretation of the order.

As we have noted, the Supreme Court of Virginia cautions that an unforeseeable accident is not actionable. Trimyer v. Norfolk Tallow Co., 192 Va. 776, 780, 66 S.E.2d 441, 443 (1951). Therefore, the nature of the appellants' duty depends in large part on the reasonable foreseeability of harm to the public, including the Semler girl, if Gilreath were released from the Institute in violation of the court's order. In this respect, the concepts of duty and proximate cause are related. *See* Prosser, Law of Torts 244 (4th ed. 1971).

Confinement of criminals frequently is intended to protect the public as well as to punish and rehabilitate the wrongdoer. But we need not rely on this generality to determine the nature of the duty imposed on Gilreath's custodians by the state court's probation order. The order itself discloses that the state trial judge had a dual purpose in placing Gilreath on probation. The judge's willingness to allow Gilreath to continue his private psychiatric treatment shows concern for his welfare. At the same time, the requirement of confinement until release by the court was to protect the public, particularly young girls, from the foreseeable risk of attack. This is demonstrated by the following facts. The pre-sentence report informed the judge that on three previous occasions Gilreath had molested other young girls. The report also contained information about Gilreath's need for psychiatric treatment, and it specifically mentioned an observation of a physician who had previously treated Gilreath that a "closed psychiatric facility would be best. . . ." It concluded with the probation officer's recommendation for

continued treatment at the Institute. On the basis of the report, the judge imposed a lengthy sentence and, before placing Gilreath on probation, informed the doctor of his concern for the public.[2]

It is apparent that the decision to release Gilreath was not to be simply a medical judgment based on the state of his mental health. The decision would also entail a judgment by the court as to whether his release would be in the best interest of the community. The special relationship created by the probation order, therefore, imposed a duty on the appellants to protect the public from the reasonably foreseeable risk of harm at Gilreath's hands that the state judge had already recognized.

Section 319 of the Restatement (Second) of Torts (1965) is close to the point. It provides:

> "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

The Restatement measures a custodian's duty by the standard of reasonable care. Here, that standard has been delineated by the precise language of the court order. The appellants were to retain custody over Gilreath until he was released from the Institute by order of the court. No lesser measure of care would suffice. This obligation was not ab-

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[2] The doctor testified:

> "Yes, [the judge] was very interested in the case. He seemed to have a thorough knowledge of John's [Gilreath's] situation, his past, his problems. He was concerned for the citizens of Fairfax County. He was concerned for John. I felt that he gave me a very complete dissertation on his feelings about what was important and how serious the situation was."

solute, of course. The appellants would not be liable had Gilreath escaped despite their exercise of reasonable care, and they could surrender his custody to the court at any time. But they could not substitute their judgment for the court's with respect to the propriety of releasing him from confinement.

We hold, therefore, that the district court correctly concluded that the state court's order imposed a duty on the appellants to protect the public by retaining custody over Gilreath until he was released by court order.

III

The second element of actionable negligence is breach of the duty imposed by law on the alleged tortfeasor. This is a factual question, Virginia Electric & Power Co. v. Steinman, 177 Va. 468, 473-74, 14 S.E.2d 313, 315 (1941), governed by the standards of Rule 52(a). The appellants, complying with the terms of the order, secured the trial judge's permission before transferring Gilreath to day care. Their principal contention is that the transfer from day care to out-patient status was simply a normal progression of treatment that required no additional judicial approval.

The district judge, however, found that there was a significant difference between day care and out-patient care. This finding is well documented by the evidence. As a day care patient, Gilreath was under the supervision of the Institute during the day. At night and on weekends he was supervised by his parents. His medication, which was essential to his treatment, could be carefully monitored, his condition readily observed, and, perhaps most importantly, the resources of the Institute could assist and sustain him in time of stress. In contrast, as an out-patient, Gilreath lived alone and attended only two therapy sessions a week. No one

effectively monitored his medication, nor was he under constant observation. Moreover, he lacked the daily psychiatric supervision which, as the doctor had emphasized, was available to him as a day care patient. Thus, he did not have the resources or the environment of the Institute to sustain him in times of mental stress. In the light of these important considerations, we perceive no error in the district court's finding that the appellants breached the duty imposed on them by the order of probation when they failed to seek the trial judge's permission to transfer Gilreath to out-patient status.

The district court also found that the doctor could not justifiably rely on the probation officer's acquiescence in the transfer. The judge did nothing to clothe the probation officer with apparent authority to approve such a transfer. The officer never told the doctor that he was empowered to speak for the state trial judge, nor did he report that the judge had approved. Similarly, the probation officer could not rely on the doctor's judgment. He knew that his own authority was limited to granting passes and that the state judge had reserved to himself the authority to determine whether more significant changes of status should be allowed.

The appellants emphasize that the district court found the evidence insufficient to prove malpractice. This finding, however, does not exonerate them, for the doctor's duty was not restricted to providing acceptable treatment for Gilreath. On the contrary, it embraced, as we explained in Part II, a duty to comply with the court order so the public would be protected. The district court found that this duty was breached. Its finding is supported by the record and, consequently, Rule 52(a) requires its acceptance.

IV

The last element of proof necessary to establish actionable negligence is, in the words of Virginia's Supreme Court, a "consequent injury." Trimyer v. Norfolk Tallow Co., 192 Va. 776, 780, 66 S.E.2d 441, 443 (1951). This raises the issue of proximate cause, which the Virginia Court usually treats as a question of fact. Standard Oil v. Williams, 202 Va. 362, 366, 117 S.E.2d 93, 95 (1960). Addressing the issue in this manner, the district judge found, on the basis of expert psychiatric testimony, that it was less likely that Gilreath would have killed the plaintiff's daughter had he remained on day care. He also accepted as "clear and convincing" the expert's testimony that the tragedy was foreseeable if Gilreath were not kept on day care or closely confined. These subsidiary findings sustain the district judge's ultimate finding that the breach of the court order was a proximate cause of the plaintiff's loss. *Cf.* Hicks v. United States, 511 F.2d 407, 420-22 (D. C. Cir. 1975). Moreover, as we noted in Part II, the probation order imposed on the appellants the duty to protect the public from assaults by Gilreath because this danger was reasonably foreseeable when the order was entered. The breach of this duty, following by the foreseeable harm on which it was predicated, in itself demonstrates proximate cause. *Cf.* Baltimore & Ohio R.R. v. Green, 136 F.2d 88, 91 (4th Cir. 1943).

The appellants argue, however, that the evidence is insufficient to show that the state trial judge would not have approved Gilreath's transfer to out-patient status had a request been laid before him. There is no direct evidence on this point. Nevertheless, it is reasonable to infer from the proven facts that the judge would not have granted his permission. Gilreath had committed a serious crime, he was

sentenced to long imprisonment, and he had been confined only a relatively short time at the Institute. Disclosure that Gilreath had initiated the Ohio venture, in part because of financial pressures, and Ohio's rejection of him as a probationer would have alerted the state judge to the problems his release might engender. Furthermore, the judge allowed Gilreath to be placed on day care status only after he had been assured in writing that the Institute would provide daily psychiatric supervision. The absence of this supervision and the other substantial differences between day care and out-patient status suggest the likelihood of the court's declining to allow the transfer, at least without further investigation.

The Institute argues that the evidence is insufficient to establish that Gilreath killed Natalia Semler and, therefore, that the plaintiff showed no causal cannection between their conduct and the plaintiff's loss. We find no merit in this contention.

It is true that no witnesses were called to prove the crime, but this is not dispositive. The parties stipulated Gilreath had been convicted of the murder, and his confession was admitted into evidence without objection as a part of the probation officer's file. In accordance with the modern view, the court was free to assign this evidence the weight it saw fit. *See* Federal Rule of Evidence 803(22); Redden and Saltzburg, Federal Rules of Evidence Manual 280 (1975); Model Code of Evidence rule 521 (1942); McCormick, Evidence 738-41 (2d ed. 1972); *see generally* Note, Admissibility and Weight of a Criminal Conviction in a Subsequent Civil Action, 39 Va. L. Rev. 995 (1953); Annot., 18 ALR2d 1287.

V

The probation officer contends that he was improperly joined as a third party defendant and that he is immune from liability because he was performing a discretionary duty. We find no error in the district court's rejection of these defenses.

Though the plaintiff and the probation officer are citizens of Virginia, impleading the officer as a third party defendant under Rule 14(a) did not require diversity of citizenship. Stemler v. Burke, 344 F.2d 393, 395 (6th Cir. 1965); J. Moore, 3 Federal Practice §§ 14.25, 14.26 (2d ed. 1974).

Under Virginia law, a state employee who exercises discretionary judgment within the scope of his employment is immune from liability for negligence. Conversely, he is liable if injury results from the negligent performance of a ministerial act. Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973). No Virginia case has applied these principles to the duties of a probation officer, but persuasive authority is not wholly lacking. A probation officer's basic policy decisions are discretionary and hence immune, but his acts implementing the policy must be considered on a case-by-case basis to determine whether they are ministerial. Johnson v. State, 73 Cal. Rptr. 240, 250, 447 P.2d 352, 362 (1968).

Virginia has adopted the following definition of a ministerial act: ". . . one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done." Dovel v. Bertram, 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945). Thus, it is apparent that the probation officer's recommendation of treatment at the Institute and his issuance of passes were discretionary rather than ministerial acts. However, the harm to the Semler girl did not result from the officer's discharge of these duties. The probation officer also was charged with the responsibility of laying requests for change in Gilreath's status before the state judge so the latter could grant or withhold approval. The district court properly ruled that this act was ministerial. It simply involved the officer's obedience to the mandate of the court order. He was obliged to see that Gilreath was not released from the type of confinement approved by the judge without the permission of the judge. This involved furnishing information to the judge and relaying the court's decision to the doctor. We hold, therefore, that the district court properly ruled that under Virginia law the probation officer was performing a ministerial act and consequently was not entitled to immunity. We also conclude that the evidence adequately supports the district court's finding that the officer's negligence contributed to the appellee's loss.

The judgments on both the complaint and the third party complaint are affirmed.

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 99-74-A

HELEN SEMLER,

Plaintiff,

v.

PSYCHIATRIC INSTITUTE OF WASHINGTON,
D. C., INC., ET AL.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For the record I find the requisite diversity of citizenship and amount in controversy to give the Court jurisdiction.

I adopt as part of the Court's findings of fact and conclusions of law the Stipulation of Facts filed on October 3rd.

Were this a mere malpractice case I would probably decide in favor of the defendants, because I think that what *medically* the defendants did in the case, while differing from what another doctor might have done and while differing from what the Court finds ought to have been done, has not been by the evidence established as malpractice, i.e., violating a standard acceptable in this or similar communities.

But this in my view is more than a malpractice case; and it is more than a malpractice case because of Judge Plummer's order. I feel that a violation of the terms of the order, of itself, gives rise to a civil cause of action. Although I think it does that irrespective of any negligence and that it

is no excuse to show that due care was exercised, I think that here there *is* negligence, and that negligence is the failure to get Judge Plummer's approval before changing the custodial status of Gilreath from that of "day-care" to "discharge" or from "day-care" to that of "out-patient."

It was obvious that Judge Plummer was unwilling in his order to allow solely medical considerations to be taken into account in deciding whether or not to release this patient from the Psychiatric Institute.

He wanted to have a hand in it, and he did participate in it. He kept control over it. He approved every change, even insignificant ones, until the passes were delegated to Mr. Folliard to approve, and that was the ony delegation he ever made.

The order of his, while not technically an order of commitment to the Psychiatric Institute, did in fact invest them with the power to release him or not release him provided they got his approval first. They initiated changes in status —they had, in effect, the keys to his freedom, subject of course to Judge Plummer's approval. But they were his custodians.

The changes in status, from the very close confinement in the first five months to the giving of more freedom, to the giving of passes, to the day-care—all were approved by Judge Plummer, and the defendants knew he had to approve them before any change could be effected. In fact, when the change to day-care was made, itself a substantial change, Judge Plummer's approval *in writing* was obtained.

From day-care to discharge or from day-care to outpatient status is a significant change, a change that warranted their getting Judge Plummer's approval. While on day-care Gilreath had certain freedom, but his medication intake could be monitored, the medication would carry over

during his periods away from the Institute, and the psychological effect of the Institute environment and knowing he had to return would also carry over. He was then staying at his parents' home at night and on weekends. All this was lost when he was put on an out-patient basis. He was then not living at home, he had a job and his attendance at the twice weekly evening therapy sessions was voluntary.

The statement that the discharge was conditional and that it would itself be revoked if things didn't work out in Ohio is belied by the fact that when Gilreath came back from Ohio, after things had not "worked out," he was not put back in day-care status, but was put on an out-patient status, still without Judge Plummer's approval.

The defendants (it is conceded that the actions of Wadeson are the equivalent of the actions of the other defendants) did not get Judge Plummer's permission to change to the status of out-patient. This was a violation of the order and negligently done; and even if due care was exercised it still gives rise, in my view, to a cause of action.

The Psychiatric Institute defendants cannot escape liability because of any reliance on the probation officer Folliard. That reliance was not justified in my view. They knew, or should have known, that every change of any substance had been made only with Judge Plummer's approval. To make a change of the type made here, clearly substantial, without that approval was unwarranted. Folliard didn't purport to speak for Judge Plummer. Folliard never told the defendants he had Judge Plummer's approval. Dr. Wadeson says he assumed that the approval had been obtained. Such an assumption was not justified and acting thereon was negligence.

Insofar as the proximate cause is concerned, the condition of probation in the court order was obviously made for

the protection of the public. Releasing this patient or changing his status to that of an out-patient in violation of the order was the cause and a foreseeable cause of the tragic occurrence that happened. The lapse of time between the unauthorized release or the unauthorized change to out-patient status was not of such duration as to make the matter a remote not a proximate cause.

It is no answer to say that he might have committed this crime while he was on day-care or while he was on a weekend pass. In the first place, the evidence is that he was less likely to have committed it while in either such status, and that the carryover from both the medication and the structured environment itself was sufficient to make it less likely that he would have committed the offense during a weekend pass or while under day-care status.

Moreover, the plaintiff ought not to be put in a position of hindsight after there has been a showing of a violation of the duty owed. It so happened that the offense did occur while Gilreath was on an unauthorized status and not while he was on a weekend pass or under day-care.

So the proximate cause is fully proved in my view. The testimony of the foreseeability of this sort of an offense occurring at the hand of this man, Gilreath, if not kept on a status of day-care or a more strict confinement, is clear and convincing.

Therefore, there will be a judgment entered against the Psychiatric Institute defendants in the amount of $25,000, which is the amount that has been stipulated as the amount recoverable if liability is found.

Insofar as the third-party defendant is concerned, I find that Mr. Folliard did mislead Dr. Wadeson by his conduct. I have found that Dr. Wadeson was not justified in relying on what Folliard did, but what Folliard did constituted joint

participation in the violation of the order. He, Folliard, initiated the discussions with regard to the Ohio trip. He in my view totally misread the letter of May 29, 1973. He should have checked with Judge Plummer before either initiating the Ohio trip or any change of status, which, apparently approved or implicitly approved, misled Dr. Wadeson.

What he did was ministerial and the duty he violated was ministerial. It is true that a probation officer is invested with many discretionary duties, but in this case he was invested solely with ministerial duties except insofar as he had discretion to authorize the passes of short duration. The violation that occurred here was not a violation of this discretionary duty. It was a violation of a ministerial duty, and that ministerial duty was to transmit requests for and get approval from Judge Plummer of changes in status or release of Gilreath by the Psychiatric Institute. He, during the times in question, really had no other duties.

It will, therefore, be the judgment of the Court that Folliard is liable for contribution to the defendants to the extent of one-half of the judgment awarded, and upon payment by the defendants to the plaintiff of the amount that judgment has been awarded against them, they are entitled to judgment over and to recover from Folliard one-half of that amount.

If counsel want an order in the case I will be glad to enter one on presentation.

What I have said, together with the Stipulation of Facts, is adopted as the Court's findings of fact and conclusions of law.

Mr. Cummings: May I raise one point?

The complaint prays for interest from the date of October 29, 1973. I would ask the Court to address itself to

the time from which interest would run because if not otherwise stated it runs from date of judgment.

The Court: It will run from date of judgment in this case.

Mr. Cummings: Thank you.

The foregoing (being a transcript of the decision as announced from the bench), with additions, is adopted as the Courts Findings of Fact and Conclusions of Law.

ALEERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
October 17th, 1974